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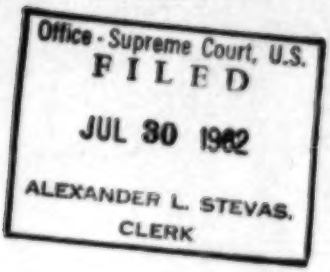

NUMBER 81-

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1981

L. B. B. CORP.

Petitioner

v.

CHARLES O. FINLEY & COMPANY, INC.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

J. Joseph Nugent, Sr. of
NUGENT & NUGENT, ESQ.
15 Westminster Street, Suite 924
Providence, Rhode Island 02903
401-421-9000

ATTORNEYS FOR PETITIONER

I. Questions Presented For Review

The questions presented for review by means of this petition are: (1) Whether or not the decision of the U. S. District Court ("MEMORANDUM ORDER," APPENDIX A) granting the motion of the respondent for judgment notwithstanding the verdict ("judgment n. o. v.") following a jury trial and a disagreement among the members of the jury was correct;

(2) Whether or not the opinion ("UN-PUBLISHED ORDER," APPENDIX B) of the three-judge panel of the Court of Appeals affirming the trial court for non-substantive reasons was correct;

(3) Whether or not the denial of the Petition for rehearing, filed timely in the Court of Appeals, was correct.

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(3) Whether or not the denial of the Petition for rehearing, filed timely in the Court of Appeals, was correct.

II. Reports of Opinions Delivered Below:

The decision of the trial judge, Joseph Sam Perry of the U. S. District Court for the Eastern Division of the Northern District of Illinois,was in writing, in the form of a "memorandum order," filed on February 10, 1981; it is appended hereto as APPENDIX A. To the knowledge of undersigned counsel it is not formally reported in any published series of casebooks.

The decision of the panel of the Court of Appeals was in the form of an unpublished order entitled "Order" and was dated January 28, 1982, although not received by undersigned Counsel for the Petitioner until February 4, 1982; it is appended hereto by the Petitioner as APPENDIX B. Also appended hereto, as Appendix B1 of the Petitioner, is the "Corrected unpublished order" of the three-judge panel affirming, with costs, the order of the court of January 28, 1982, which is Appendix B. It is dated February 4, 1982.

The Petitioner also appends hereto, as Appendix C, the "ORDER" of the judges on the panel denying the petition of the plaintiff-appellant, and Petitioner herein, for rehearing, which was timely filed on or about February 10, 1982; the date of said Order is March 25, 1982.

III. Statement of Grounds of Jurisdiction Invoked:

This Petition is filed, and this Court has jurisdiction pursuant to the provisions of Section 2101 of Title 28 of the United States Code, Subsection (c), and 28 U.S.C.Sec.1254 as this is a civil action initiated in a U. S. District Court between corporate citizens of different states which was tried before a jury of a U. S. District Court and, in due course, appealed to the U. S. Court of Appeals, where judgment has been rendered and a timely

petition for rehearing denied. The date of the original judgment was February 10, 1981, the date that the appeal was claimed in the District Court in Illinois by the Petitioner was February 17, 1981. Its brief was filed on May 15, 1981. An unpublished order (Appendix B) affirming the District Court decision was filed on January 28, 1982 and corrected on February 4, 1982 (Appendices B and B1). A Petition for Rehearing (See Appendix D) in the Court of Appeals was forwarded on February 10, 1982 and was returned for non-conformity to the local rules, was then accepted for filing on March 8, 1982, and was denied on March 25, 1982 (See Appendix C). In addition, a petition for rehearing en banc was filed on February 12, 1982, and a supplemental petition for rehearing en banc was filed on April 9, 1982 (See Appendix E and Appendix F of the Petitioner, separately presented). Neither petition for rehearing en banc was considered or decided by the Court of Appeals and counsel was so informed.

IV. Constitutional Provisions, Treaties, Statutes, etc., Involved:

The Seventh Amendment to the U. S. Constitution, which reads:

> In suits at Common Law, where the value in controversy shall exceed

twenty dollars, the right of the trial by jury shall be preserved, and no fact tried by a jury, shall be otherwised reexamined in any court of the United States, than according to the rules of the Common Law.

Rule 10 of the Federal Rules of Appelate Procedure, which reads in part:

* * *

(b) (1) Within ten days after filing the notice of appeal the Appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the Clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the Appellant shall file a certificate to that effect.

(2) If the Appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence he shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the Appellant shall, within the ten days time provided in (b) (1) of this Rule , file a statement of the issues he intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript of other parts of the proceedings

to be necessary, he shall, within ten days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within ten days after service of such designation the appellant has ordered such parts and has so notified the appellee, the appellee may within the following ten days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) At the time of ordering a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript."

Rule 50 (b) of the Federal Rules of Civil Procedure:

> Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of jugment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may re-open the judgment and either order a new trial or direct the

entry of jugment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

V. Concise Statement of the Case:

This appeal, in a word, is unnecessary. It is a result of a comedy of errors. A brief review of the record should lead this court to conclude that summary relief is appropriate.

The major ground of the petitioner's appeal from the Memorandum Order of the District Court (see Appendix A) was that the trial judge erred in entering judgment notwithstanding the verdict on or about February 10, 1981, after a jury was unable to agree on a verdict in December, 1980 after a five-day trial. The decision of the trial judge to enter judgment notwithstanding the verdict ("Judgment n. o . v.") was so manifestly erroneous on the face of the written decision itself that relief should have been summarily granted in the court of appeals, rather than the opposite.

During the trial on December 4, 1980, the trial judge, after hearing the respondent's motion for a directed verdict, stated as follows:

> "THE COURT: I think that this is a case for the Jury. Motion denied."

On December 8, 1980, while the jury below

was in deliberation, the Court decided in the absence of counsel to discharge the jury and declare a mistrial, then stated as follows:

> "THE COURT: Gentlemen, you are now discharged. I will invite you into my Chambers to take a look at an exhibit that I have.
>
> And of course, there will have to be a new trial; that is if the Plaintiff persists in a new trial. And the reason that I have asked now as to the division, is in order to guide the principles and the parties to what their future conduct might be. It might be possible that the plaintiff may not choose to try the case again under the circumstances, but that is the decision. You are now discharged.
>
> And I will invite you in. Ms. Marshal, you may bring them into my Chambers, and I will discuss the matter with them — not the case, I will not discuss the case, but only my exhibit but which is in my Chambers. (Emphasis supplied).

It should be noted here that this case was originally filed in 1974 and, after assignment to two active judges of the District Court, who were unable to try it because of their case loads, was assigned to an eighty-one-year-old senior retired judge, who heard it on December 1-5, 1980 before a jury. It should also be noted that His Honor's statements quoted here are taken directly from stenographer's transcripts which were provided to the Court of Appeals as appendices to the

brief of the appellant-petitioner.

In any event, notwithstanding the aforequoted representations made on the record at the time that he declared a mistrial, in the absence of counsel and clients, the trial judge apparently failed or refused to refrain from discussing the case with the jurors after they had been invited into his Chambers to see his exhibit. That is evident from the memorandum decision filed by him on February 10, 1981, which is attached hereto as Appendix A. In that "Memorandum Order" the trial judge stated as follows:

> " . . . The court desires to note that after the jury's decision, the jurors were invited into the court's chambers to view a mastodon exhibit; that while they were out of the presence of each of the counsel, the jurors briefly discussed their decision and stated that five of them had found in favor of the defendant while only one had found for the Plaintiff. This disclosure was later made known by the Court to each party's counsel.
>
> "In view of the foregoing,it is ORDERED that each of the aforesaid motions of the defendant be and the same hereby is granted . . ."

It was therefore the view of the Appellant, the Petitioner here, that the decision of the trial judge in February, 1981 to enter judgment n. o . v. in favor of the defendant was inconsistent with his earlier decision not to discuss the case with the jurors, if not improper because of his reliance on what he had been told, off of the record, by the

members of the jury out of the presence of counsel, and that the manifest error of the trial judge would cause a reversal of his decision by the Court of Appeals.

Nevertheless, counsel to the Plaintiff-Appellant-Petitioner, out of an abundance of caution,
had all proceedings following the conclusion of testimony transcribed by the court reporter and appended to its brief for the Court of Appeals.

To further narrow the issues and focus the attention of the Court of Appeals, the Petitioner did not request the Court of Appeals to decide whether or not the trial judge incorrectly weighed or viewed the evidence in granting the judgment n. o . v. The Petitioner stopped at the threshhold question of whether or not the Court observed the correct standards to be employed in determing whether or not judgment n. o. v. should have been entered and, further, whether or not it was reversible error for the trial court to have failed to have supported its decision with express findings of fact and conclusions of law.

Nevertheless, after oral argument before the Court of Appeals was allowed to be waived on December 1, 1981, the three-judge panel to which the appeal had been assigned notified counsel to the Appellant, Petitioner herein, of the necessity for additional transcribed matter. That was on December 19, 1981. See

Petitioner's Appendix D. While attempting to obtain clarification of the amount of transcribed material that the panel wanted, the Appellant/Petitioner received the proverbial bolt out of the blue in the form of Appendix B.

On January 28, 1982, the panel filed an unpublished per curiam decision wherein it denied and dismissed the appeal of the Petitioner. The panel viewed the appeal as raising three issues, and decided them (its first mistake) in an order other than in which they were raised. The first issue raised, namely that the Appellee had not complied with F. R. Civ. P. 50 in filing its motion for directed verdict was determined to be not well-founded because, according to the Court of Appeals, the Appellee had in fact complied with the Rule in filing its motion for judgment n. o. v. The third issue raised, treated in Appendix B as issue number "(2)," was that the trial judge should have supported his decision to grant the motion from the respondent for judgment n. o. v. with express findings of fact and conclusions of law; it was deemed to be without merit because the Rules of Civil Procedure do not explicitly require District Court judges to make such findings of fact and conclusions of law. The last issue considered, and the second issue raised in the brief of the Appellant/Petitioner, namely that the defendant's motion for judgment n. o. v. should not have been granted in the first place, was disposed of by a sua sponte

dismissal in light of the presumed and mistaken violation by the Plaintiff-Appellant of Rule 10 (b) (2) of the Federal Rules of Appellate Procedure. That Rule, in the view of the panel, unequivocally requires all appealing parties in the Court of Appeals to include in the record a transcript of all evidence presented at trial. That, of course, is not the language of the Rule. *

Since the Appeals Court's disposition of "third assertion of error" of the Petitioner was based on an assumed violation of the Rules of Appellate Procedure, the Plaintiff-Appellant petitioned for rehearing by the three-judge panel and moved for enlargement of time in which to obtain and file a complete transcript of the trial proceedings if deemed necessary by the Court. (see Appendix D). In the petition for rehearing, the Plaintiff-Appellant-Petitioner argued that the panel was mistaken in assuming that the Appellant had violated F. R. A. P. 10 by failing to provide adequate transcripts to permit the Court or Appeals to make an informed decision, that whether or not a complete trial transcript was provided the record appended to the brief of the Appellant revealed reversible error so clearly as to not require any additional transcription of any additional evidence, and that the Petitioner had not at any time

*The panel was not so technically strict when the Respondent filed its Brief four days out of time, in violation of Local Rules 7 and 8.

intended to urge on appeal that "a finding or conclusion is unsupported by the evidence or is contrary to the evidence". F. R. A. P. 10 (b) (2). The Petitioner also pointed out in its petition for rehearing that the Seventh Amendment to the U. S. Constitution, as interpreted by this Court in Slocum vs. New York Life Insurance Co., 33 S. Ct. 523 (1913) and Baltimore & Carolina Line vs. Redman, 55 S. Ct. 890 (1935) had probably been violated by the refusal of both the District Court and the Court of Appeals to give the Petitioner a new trial. See also Bonner vs. Coughlin, 657 F.2d 931 (7th Cir. 1981) and Munn vs. Mutual Services Casualty Insurance Co, 88 F. R. D. 364,367, fn. 8 (N.D. California 1980).

These arguments were apparently unconvincing because the three-judge panel denied the petition for rehearing on March 25, 1982. (see Appendix C) and would not reconsider the case en banc.

The basis for federal jurisdiction in the District Court, in the first instance, was its diversity jurisdiction, so-called, pursuant to 28 U. S. C. Section 1332. This is and was a contract action, within an additional count alleging Unjust Enrichment, arising from the execution of a written contract by principals of Rhode Island and Illinois corporations in Chicago in 1973. The jurisdiction of the federal courts was never questioned.

VI. Amplification, as Required by Supreme Court Rule 17:

This is not simply a case where the clarity of the errors in the trial and appellate courts necessitate both consideration and relief. This case also presents reasons for consideration of a special character.

For example, it is possible that the decision of the Court of Appeals refusing to impose upon district court judges in its district the requirement of setting forth express findings of fact and conclusions of law when entering judgment n. o. v. is in conflict with decisions of other circuits' Courts of Appeals. This in addition to the obvious intent of the drafters of the rules of civil procedure that contested civil actions decided without a jury or with an advisory jury, as apparently was the case here, shall contain findings of fact and separate conclusions of law. See F. R. Civ. P. 50 (b) and 52 (a). See also 5A Moore's Federal Practice p. 2736.

In the Sixth Circuit, it has been held that it is commendable for a trial judge disposing of a case under F. R. Civ. P. 50 to divulge his rationale, if only to insure a responsible review at the appellate level and full and fair consideration of each case by the lower courts of the Circuit. Garrison vs. Jervis B. Webb Co., 583 F.2d 258 (6th Cir. 1978). The same court, in Morelock vs.

N. C. R. Corp., 586 F.2d. 1096 (6th Cir. 1978), a case involving a post-jury verdict entry of judgment n. o. v., the Court of Appeals stated the obvious, namely that it is better for all concerned for a trial court to delineate with specificity its reasons for the entry of judgment n. o. v. rather then merely stating in conclusory terms that there is no substantial evidence to support the verdict. Other Courts of Appeal of the federal circuits have recognized the wisdom of express findings of fact by trial justice in dispositive proceedings, including the Court of Appeals for the Seventh Circuit. (See United States vs. Shaheen, 445 F.2d. 6 (7th Cir. 1971), Boazman vs. Economics Laboratory, Inc., 537 F.2d. 210 (5th Cir. 1976), Steed vs. Central of Georgia Ry., 477 F.2d 1303 (5th Cir. 1973), Dolgow vs. Anderson, 438 F.2d. 825 (2nd. Cir. 1970), Lea vs. Cone Mills, Corp., 467 F.2d. 277 (4th Cir. 1972), Hodgson vs. Humphreys, 454 F.2d. 1279 (10th Cir. 1972) and In Re. Uranium Antitrust Litigation, 473 F. Supp. 382,390 (N. D. Ill. 1979).

Parenthetically, it should be noted that the decision of the Court of Appeals to refuse to interpret F. R. Civ. P. 50 (b) and 52 (a) as requiring trial judges to set forth findings of fact and conclusions of law when deciding cases without a jury was clearly at variance with a decision of the same court in the same term, which stated

that a reversal will follow for failure of a trial judge to reserve decision on a motion for a directed verdict during the trial before granting a motion for judgment n.o.v. See Bonner vs. Coughlin, 657 F.2d 931 (7th Cir. 1981)

There is also a significant constitutional question raised in this appeal, involving the application of the Seventh Amendment. There is obvious conflict between F. R. Civ. P. 50 (b) and the Seventh Amendment protecting the right to trial by a jury in civil cases. In Slocum vs. New York Life Insurance Co., 228 U. S. 364 (1913) the High Court ruled that the entry of judgment n.o.v. was a violation of the Seventh Amendment. This was, of course, before adoption of F. R. Civ. P. 50 in the 1930s. Thereafter, present Rule 50 (b) practice was distinguished and approved in Baltimore & Carolina Line vs. Redman, 295 U. S. 654 (1935). However, it was not approved without qualification. In Redman, the High Court permitted the court to enter judgment n.o.v. because it was deemed by the Supreme Court to be a reservation of a decision on an earlier motion for directed verdict. 295 U. S. at 658-659. Moreover, the Court found that the issue raised in the reserved motion for directed verdict did not invade the province of the jury because it merely addressed the issue of whether the evidence was sufficient as a matter of law. The conclusion is inescapable that the Court would rule that a Constitutional violation occurs if, as a

factual matter, as in this case, sufficient evidence was present and the court reversed the jury verdict. It should be noted that, additionally, in Redman supra, the entry of judgment n. o. v. was affirmed only because the district court, which had been reversed by the Court of Appeals for failing to grant a reserved motion for a directed verdict after the jury returned for the Plaintiff, had "expressly reserved its ruling on the defendant's motions to dismiss and for a directed verdict," both of which were based on the asserted legal insufficiency of the evidence. In this case, the motion of the respondent at the trial for a directed verdict was unqualifiedly denied by the trial judge, who did not reserve his decision at any point on any motion for a directed verdict. Hence, the Seventh Amendment rights of the Petitioner were violated.

Finally, there is the question of whether or not the Court of Appeals, in interpreting F. R. A. P. 10 (b) as requiring the filing of transcripts of all evidence adduced at trial, even when parties do not raise the issue of the sufficiency of the evidence to support the adverse determination of the trial court, so far departs from the accepted and usual course of judicial discretion as to call for an exercise of this Court's power of supervision. F. R. A. P. 10 (b) requires the Appellant to order from the court reporter

a transcript "of such parts of the proceedings not already on file as he deems necessary, subject to local rules of the Courts of Appeals." In this case, the Petitioner, within ten days after filing its notice of appeal, ordered from the reporter a transcript of such parts of the proceedings not already on file as it deemed necessary. See Appendix D, specifically Affidavits of counsel contained therein. The same rule, F. R. A. P. 10 (b) (2) requires that the Appellant, if it intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, must include in the record a transcript of all evidence relevant to such finding or conclusion. That requirement might justify the filing of a complete trial transcript. However, in this case, the Appellant argued that the decision of the trial judge granting the motion for judgment n. o. v. was so clearly deficient on its face as to justify a reversal and a new trial. The Appellant did not urge on appeal that a finding or conclusion of the trial judge was unsupported by the evidence or was contrary to the evidence. Moreover, the same rule, F. R. A. P. 10 (b) (3), requires the appellee to move in the district court for an order requiring the Appellant to file additional transcribed testimony if the appellee feels that the transcripts provided by the Appellant are inadequate. In this case, the appellee neglected to do so.

Hence, there is a serious question of

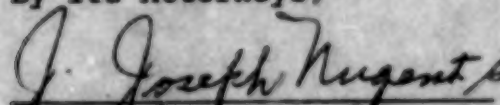
the extent of the Court of Appeals' discretion in requiring compliance with Rule 10. Does it have unfettered discretion? Can it ever abuse its discretion, if that discretion is limited? If both of those questions are answerable in the affirmative, then the Court of Appeals has done so in this case.

VIII. Appendix:

The appendices of the Petitioner are separately presented in compliance with Supreme Court Rule 21.1 (k), and contain a frontis piece as well as a table of contents. The judgment sought to be reviewed may be found at Appendix B.

Respectfully submitted,

L. B. B. Corp.
By its Attorneys,



J. Joseph Nugent, Sr.
75 Westminster Street
Providence, Rhode Island 02903
401-421-9000

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed via regular, postage prepaid, first class U. S. Mail, three exact copies of the within Petition for Issuance of Writ of Certiorari, together with three copies of the Appendices in support of said Petition to Samuel V. P. Banks and Terrence P. LeFevour, Attorneys for the respondent, at their regular and usual place of business, 221 North LaSalle Street, 38th Floor,Chicago, Illinois 60601 on June 23, 1982 at approximately 3:00 P.M. by depositing same in a mailbox at the United States Post Office.

J. Joseph Regenstein

NUMBER 81

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1981

L. B. B. CORP.
Petitioner

v.

CHARLES O. FINLEY & COMPANY, INC.
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

J. Joseph Nugent, Sr. of
NUGENT & NUGENT, ESQ.
15 Westminster Street, Suite 924
Providence, Rhode Island 02903
401-421-9000

ATTORNEYS FOR PETITIONER

PETITIONER'S APPENDICES

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A. Memorandum Order of the U. S. District Court (Northern District, Illinois) dated February 10, 1981.

B. Unpublished *Per Curiam* Decision of the Court of Appeals dated January 28, 1982; Corrected Unpublished Order dated February 4, 1982.

C. Order of March 25, 1982, Denying Petition for Rehearing

D. Petition for Rehearing of February 10, 1982, with Affidavits, Exhibits, and Memorandum of Authorities.

E. Petition for Rehearing En Banc of February 12, 1982

F. Supplemental Petition for Rehearing En Banc of the Appellant of April 9, 1982.

Petitioner's Appendix A

Decision of the Trial Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 74 C 3258

L. B. B. Corporation,
Plaintiff,
vs.
Charles O. Finley & Company,
Defendant.

MEMORANDUM ORDER

This cause comes on upon the following motions: (1) defendant's motion for judgment notwithstanding the verdict; (2) plaintiff's motion for judgment notwithstanding the verdict; and (3) defendants motion to strike plaintiff's motion for judgment notwithstanding the verdict.

The court has read and considered each of the aforesaid motions and the memoranda of the respective parties and now finds that defendant's motions are well taken and should be granted for the reasons set forth in defendant's memorandum of law. Further, the court desires to note that after the jury's decision, the jurors were invited into the court's chambers to view a mastodon exhibit; that while there out of the presence of each of the counsel the jurors briefly discussed their decision and stated that five of them had found in favor of the defendant while only one had found for the plaintiff. This disclosure was later made known by the court to each party's counsel.

In view of the foregoing, it is ORDERED that each of the aforesaid motions of the defendant be and the same hereby is granted; that plaintiff's motion for judgment notwithstanding the verdict be and it hereby is STRICKEN; that judgment without costs be and the same hereby is awarded in favor of the defendant and against the plaintiff; that plaintiff take nothing by this action; and that each party pay its own costs.

ENTER:

/s/ J. S. Perry
District Judge

Dated: February 10, 1981

Petitioner's Appendices B

Unpublished *Per Curiam* Decision of the
Court of Appeals;
Corrected Unpublished Order

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 2, 1981
January 28, 1982

Unpublished Order not to be cited under Circuit Rule 35

Before

Hon. Luther M. Swygert, Senior Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge

L.B.B. CORP., Plaintiff-Appellant,
No. 81-1352

vs.

CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division
No. 74-C-3258
Joseph Sam Perry, Judge

ORDER

This dispute arose out of a contract whereby the plaintiff-appellant L.B.B. Corporation (LBB) attempted to purchase a basketball franchise from the defendant-appellee Charles O. Finley and Company, Inc. (Finley). LBB tendered to Finley a deposit of $100,000 towards the purchase price. The contract

provided that LBB would "execute such applications and take such formal steps as may be required by the ABA (American Basketball League)" and the down payment would be returned if the ABA did not approve the transfer of ownership. Although the ABA conditionally approved the sale, the transfer was never completed and Finley kept the deposit. Finley believed that LBB had breached the contract by not taking the formal steps required. LBB brought suit to recover the $100,000, claiming that the conditions upon which ABA approval was contingent were not those contemplated in the contract. Thus, there was no ABA approval in fact and LBB was entitled to a return of its deposit.

The trial resulted in a hung jury and Finley's motion for judgment notwithstanding the verdict (JNOV) was granted. LBB raises three issues on appeal:

(1) Finley did not comply with Rule 50, Federal Rules of Civil Procedure, because the motion for JNOV was not in writing;

(2) the trial court did not support its decision with express findings of fact and conclusions of law; and

(3) the evidence was not sufficient to support the granting of Finley's motion for JNOV.

The answer to LBB's first argument on appeal is that Finley did file a written motion for JNOV which was docketed and became a part of the record on December 17, 1980. If LBB's counsel had taken time to examine the record, he would have discovered this fact.

LBB's second ground for appeal is also without merit. Rule 52(a), Federal Rules of Civil Procedure, requires the trial court to make findings of fact and conclusions of law only in trials without a jury. Even though the court ultimately decided this case, it was still a jury trial. Although this Court would prefer that the District Court make findings of fact and conclusions of law in directed verdicts and JNOV's, it is not mandated by the

federal procedural rules. *See, e.g., Weir v. Chicago Plastering Institute*, 272 F.2d 883, 888 (7th Cir. 1959).

LBB's third assertion of error must be dismissed. Rule 10(b)(2) of the Federal Rules of Appellate Procedure provides that: "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion". LBB has failed to comply with this rule. Further, LBB's brief failed to discuss why the record produced at trial would not support the JNOV. Rule 10(b)(2) was promulgated to allow courts to make an independent evaluation of the evidence. The court cannot make an informed decision where this rule has not been complied with.

Accordingly, the judgment appealed from is affirmed.

Unpublished Per Curiam Order
CORRECTED February 4, 1982
JUDGMENT -- WITHOUT ORAL ARGUMENT
UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
CORRECTED - February 4, 1982
January 28, 1982
Before
Hon Luther M. Swygert, Senior Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge

L.B.B. CORP.
Plaintiff-Appellant,
NO. 81-1352
vs.
CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 74-C-3258
Judge Joseph Sam Perry

This cause came before the Court for decision on the record from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration whereof, **it is ordered and adjudged** by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the Order of this Court entered this date.

Petitioner's Appendix C

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60601

March 25, 1982

Before

Hon. Luther M. Swygert, Senior Circuit Judge
Hon. Wilbur F. Pell, Circuit Judge
Hon. William J. Bauer, Circuit Judge

L.B.B. CORP.,
Plaintiff-Appellant,

No. 81-1352

vs.

CHARLES O. FINLEY & CO., INC.
Defendant-Appellee.

Appeal from the
United States District Court
for the Northern District of Illinois
Eastern Division.
No. 74-C-3258
Joseph Sam Perry, Judge.

ORDER

On consideration of the petition for rehearing filed by counsel for the plaintiff-appellant, the judges on the panel have voted to deny the petition.

IT IS THEREFORE ORDERED that said petition for rehearing be, and the same is hereby denied.

Petition's Appendix D
Petition for Rehearing

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

L.B.B. CORP.,
Plaintiff-Appellant,

No. 81-1352

vs.

CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee

Appeal from the
United States District Court
for the Northern District of Illinois
Eastern Division.

No. 74-C-3258
Joseph Sam Perry, Judge

PETITION FOR REHEARING

Now comes the Plaintiff-Appellant in the above-entitled cause to petition this honorable Court, pursuant to Circuit Rule 16, for rehearing and/or reconsideration of its decision to dismiss the appeal of the Plaintiff-Appellant, specifically of that portion of its unpublished Order of January 28, 1982 dismissing the third assertion of error for the failure of the Plaintiff-Appellant to abide by Rule 10(b)(2) of the Federal Rules of Appellate Procedure.

Further, the Plaintiff-Appellant moves this honorable Court to vacate its dismissal of the Plaintiff-Appellant's third assertion of error; and to enlarge the time in which the Plaintiff-Appellant may file a complete transcript of the trial below if this Court deems a full transcript to be necessary, for a period not to exceed sixty days.

Plaintiff-Appellant, L.B.B. Corp.

By its Attorney,

J. Joseph Nugent, Jr., Esquire
15 Westminster Street, Suite 924
Providence, Rhode Island 02903
401-421-9000

AFFIDAVIT IN SUPPORT OF PETITION FOR REHEARING

I, J. Joseph Nugent, Jr., of Westport, Massachusetts do hereby make oath and subscribe to the following facts:

1. That I am, and have been since the initiation of this litigation in the U. S. District Court in the District of Rhode Island, principal counsel to the plaintiff-appellant;

2. Following the receipt of the Memorandum Order of Senior Judge J. Sam Perry, entered on or about February 10, 1981, I caused a Notice of Claim of Appeal to be docketed in the Court on March 6, 1981;

3. Following receipt of instructions in the form of a memorandum signed by Thomas Strubbe, Clerk of the Court of Appeals, I filed a Certificate of Interest on March 12, 1981

4. On March 12, 1981, I forwarded an Order for the Transcript, an exact copy of which is attached hereto and incorporated by reference as Exhibit 1, to the office of the Clerk of the Court of Appeals, with a cover letter addressed to Alyce M. Mobley, Deputy Clerk, who had notified me by letter of March 4, 1981 that the record on appeal was due on or before March 16, 1981; at the same time, I notified her, pursuant to Circuit Rule 4(a) that I wished to have certain additional portions of the District Court record included in the record that was certified to the Court of Appeals;

5. The Order for Transcript (see Exhibit 1) was served on counsel to the defendant, since only a partial transcript was ordered; at no time did counsel for the appellee object to the contents thereof and/or serve on the undersigned counsel a designation of additional parts of the transcript to be necessarily included in the appellant's filing of said transcript;

6. On or about March 30, 1981, I received a phone call from the office of Chief Court Reporter Youker -- the person on the phone identified herself as Rosemary -- advising me that they had only recently received my Order for Transcript and further advising me to seek and obtain an extension of time within which to file the brief and/or transcript;

7. On March 31, 1981, I caused to be mailed to the Court of Appeals a Motion for Extension of Time, with an affadavit attached thereto, in which I advised this Court of my telephone conversation with the woman from the office of the Official Court Reporter, and further advising the Court that I did not have any of the transcripts necessary in order to adequately and properly prepare the brief of the Plaintiff-Appellant;

8. On April 2, 1981, I mailed a copy of the aforementioned Order for Transcript to the court reporter who sat during the trial below, Diane Meyer, together with a cover letter and a check for $50.00;

9. On or about April 25, 1981, I received excerpts of trial court proceedings, from the office of Claude W. Youker, Jr., Official Court Reporter for the United States District Court for the Northern District of Illinois, which excerpts were made a part of the Appellant's Appendices, and appended to the brief of the plaintiff-appellant filed with this Court on or about May 15, 1981.

Subscribed and sworn to before me this 10th day of February, 1982.

_____

J. Joseph Nugent, Jr.

MY COMMISSION EXPIRES
March 12, 1987

Exhibit I

To: HONORABLE J. S. PERRY, Senior District Judge
From: J. Joseph Nugent, Jr., Counsel to Plaintiff-Appellant
Re: L.B.B. CORP. vs. CHARLES O. FINLEY & CO., INC.
(No: 74-C-3258)

ORDER FOR TRANSCRIPT

NOW COMES the Plaintiff-Appellant in the above-entitled cause, and pursuant to F.R.A.P. 10(b), hereby orders the stenographic record of the following portions of proceedings, with exact or approximate dates, in said cause which it deems necessary for the record on appeal:

(1) The Defendant's Motion for Directed Verdict made orally on or about December 4, 1980 at approximately 11:00 A.M.;

(2) All post-trial proceedings, including questioning of and/or colloquy with members of the jury, motions, arguments, etc. following instructions to the jury and retirement of the jury to deliberate at approximately noontime on December 5, 1980.

/s/ J. Joseph Nugent, Jr.

J. Joseph Nugent, Jr.
NUGENT & NUGENT, ESQUIRE
925 Hospital Trust Building
Providence, Rhode Island 02903
401-421-9666

CERTIFICATION

I hereby certify that I caused to be served an exact copy of the within Order for Transcript on the following interested counsel, via U.S. first-class mail, postage prepaid, on March 12, 1981: AVERY, HODES, COSTELLO & BURMAN, 221 North LaSalle Street, Suite 3800, Chicago, Illinois 60601; SAMUEL V.P. BANKS, ESQ., 180 North LaSalle Street, 38th Floor, Chicago, Illinois 60601.

/s/ J. Joseph Nugent, Jr.

SUPPLEMENTAL AFFIDAVIT
IN SUPPORT OF PETITION FOR REHEARING

I, J. Joseph Nugent, Jr., of Westport, Massachusetts do hereby make oath and subscribe to the following facts:

1. I am, and have been since the initiation of this litigation in 1974, principal counsel to the Plaintiff, a Rhode Island corporation;

2. On or about December 19, 1981, I received a letter from a Mr. Branch, Deputy Clerk of the Court of Appeals for the Seventh Circuit, an exact copy of which is attached hereto and incorporated by reference, wherein I was informed that "because of the Courts decision to decide your appeal on the records and briefs, the Court feels to make a more informed decision, the transcripts will be needed". (See Exhibit 1 attached hereto);

3. On or about December 22, 1981, I placed a telephone call to Deputy Clerk Branch, wherein he expressed ignorance of the details, facts, and circumstances surrounding the writing of the letter signed by him on December 15, 1981; he referred me to a superior, a Mr. Paul Grossman;

4. On December 29, 1981, I spoke with Mr. Grossman by telephone; he advised me that the ". . . Court wants more . . . does not have enough to make an informed decision". When I asked him if the Court wanted the entire trial transcript, he told me that he assumed that the Court wanted the entire trial transcript, he told me that he assumed that the Court did want the entire trial transcript, and told me that, "You're not going to get a decision until you file it ...";

5. On December 31, 1981, I wrote a letter to the Court Reporter, after remembering her name with difficulty, who had been present during the trial of the within case in District Court, an exact copy of which is attached hereto and incorporated by reference as Exhibit 2;

6. On January 6, 1982, I returned a telephone call of Mrs. Myer-Moran, who advised me that the entire trial transcript would cost approximately $1,550.00, of which she would require an advance payment of one-half of that amount;

7. I thereafter, on or about January 12, 1982, wrote to Mr. Branch at the Office of the Clerk of the Court of Appeals asking "if there is anything specific that occurred at the trial which the Court deemed necessary to be transcribed, in light of the great expense that will be necessary to transcribe the entire trial proceedings"; (see Exhibit 3 attached hereto and incorporated by reference);

8. At the time of the filing of the Appellant's brief, on or about May 15, 1981, the undersigned counsel appended to said brief, in conformity with Local Rule 12, transcripts of all of the proceedings which took place in the District Court below following the Court's instructions to the jury on or about December 5, 1980;

9. The undersigned counsel did not receive, at any time between January 12, 1982 and February 4, 1982, a written or oral response to his letter which is attached hereto as Exhibit 3; his first notification that he was in violation of Rule 10(b) of the Federal Rules of Appellate Procedure was received in the form of the Court's unpublished Order dated January 28, 1982, which Order was received on February 4, 1982, and is attached hereto and incorporated by reference as Exhibit 4.

/s/ J. Joseph Nugent, Jr.

Subscribed and sworn to before me this tenth day of February 1982, at Westport, Massachusetts.

/s/ Gerard R. Hadjer

(SEAL)

MY COMMISSION EXPIRES
MARCH 12, 1987

Exhibit 1

United States Court of Appeals
For The Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Thomas A. Strubbe
Clerk
312-435-5850

In Re:
L.B.B. CORP.
vs.
CHAS. O. FINLEY & CO.
No. 81-1352 *12/15/81*

Dear Sir:

I am writing to inform you that because of the Courts decision to decide your appeal on the records and briefs, the Court feels that to make a more informed decision the transcripts will be needed.

Therefore the Court is requesting that you order the transcripts from the court reporter, so that they may be certified by the District Court and then transmitted to our office. If you have any questions concerning this request please contact our office.

Respectfully,

Deputy Clerk

Called Mr. Branch on December 22, 1981; wants me to call Mr. Grossman for further clarification.

Mr. Paul Grossman (December 29) - court wants more - does not have enough to make an informed decision - he assumes that that means the entire trial. Said: "You're not gonna get a decision until you file it..."]

Exhibit 2

December 31, 1981

Diane Meyer, Official Court Reporter
U. S. District Court
1918 U. S. Court House
219 South Dearborn Street
Chicago, IL 60604

RE: **L.B.B. Corp. v. Charles O. Finley & Co., Inc.**
(No. 74-C-3258)

Dear Diane:

As you can see from the enclosed letter, the Court of Appeals in the above-referenced matter is requiring more transcript than we have filed as appendices to our brief.

At your earliest opportunity, please provide me with an estimate of the cost of the trial transcript, which occurred between December 1 and December 8, 1980, excluding what you have already transcribed.

You have provided me with: argument and decision on motion for directed verdict on December 4, 1980; colloquy between court and counsel while jury was deliberating on December 8, 1980; argument, colloquy and decision on December 23, 1980 on the motion of the defendant for judgment notwithstanding the verdict.

Thank you in advance for your cooperation. Happy New Year.

Very truly yours,

J. Joseph Nugent, Jr.
(401) 421-9000

JNN,Jr./dm
Enc.

Exhibit 3

NUGENT & NUGENT, ESQUIRE
Attorneys and Counsellors at Law
15 Westminster Street, Suite 924
Providence, Rhode Island 02903

January 12, 1982

U. S. Court of Appeals
Office of the Clerk
219 South Dearborn Street
Chicago, Illinois 60604

RE: L.B.B. Corp. v. Charles O. Finley & Co., Inc.
(81-1352)

Dear Mr. Branch:

I spoke to you on December 22, 1981, regarding your letter of December 15, 1981 informing me that the Court felt that to make a more informed decision "the transcripts will be needed". You referred me at that time to a Mr. Grossman for further clarification.

I spoke to Mr. Grossman on December 29, and he told me that he assumed that the Court wanted the entire transcript of the trial, other than what was already provided and appended to the briefs. I told him that I would speak to my client.

I have spoken to my client, who does not have the means to pay for the entire trial transcript - I have obtained an estimate from the stenographer at the trial and the estimate was over $1500 - and he has asked me to write to see if there is anything specific that occurred at the trial which the Court deems necessary to be transcribed, in light of the great expense that will be necessary to transcribe the entire trial proceedings.

I await your advice.

Very truly yours,
/s/ J. Joseph Nugent, Jr.
J. Joseph Nugent, Jr.
(401) 421-9000

Exhibit 4

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Submitted December 2, 1981

January 28, 1982

Before
Hon. Luther M. Swygert, Senior Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge

L.B.B. CORP.,
Plaintiff-Appellant,
NO. 81-1352
vs.
CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee.

Appeal from the
United States District Court
for the Northern District of Illinois
Eastern Division.

No. 74-C-3258
Joseph Sam Perry, Judge

ORDER

This dispute arose out of a contract whereby the plaintiff-appellant L.B.B. Corporation (LBB) attempted to purchase a basketball franchise from the defendant-appellee Charles O. Finley and Company, Inc. (Finley). LBB tendered to Finley a deposit of $100,000 towards the purchase price. The contract provided that LBB would "execute such applications and take such formal steps as may be required by the ABA (American Basketball League)" and the down payment would be returned if the ABA did not approve the transfer of ownership. Although the ABA conditionally approved the sale, the transfer

was never completed and Finley kept the deposit. Finley believed that LBB had breached the contract by not taking the formal stepos required. LBB brought suit to recover the $100,000 claiming that the conditions upon which ABA approval was contingent were not those contemplated in the contract. Thus, there was no ABA approval in fact and LBB was entitled to a return of its deposit.

The trial resulted in a hung jury and Finley's motion for judgment notwithstanding the verdict (JNOV) was granted. LBB raises three issues on appeal:

(1) Finley did not comply with Rule 50, Federal Rules of Civil Procedure, because the motion for JNOV was not in writing;

(2) the trial court did not support its decision with express findings of fact and conclusions of law; and

(3) the evidence was not sufficient to support the granting of Finley's motion for JNOV.

The answer to LBB's first argument on appeal is that Finley did file a written motion for JNOV which was docketed and became a part of the record on December 17, 1980. If LBB's counsel had taken time to examine the record, he would have discovered this fact.

LBB's second ground for appeal is also without merit. Rule 52(a), Federal Rules of Civil Procedure, requires the trial court to make findings of fact and conclusions of law only in trials without a jury. Even though the court ultimately decided this case, it was still a jury trial. Although this Court would prefer that the District Court make findings of fact and conclusions of law in directed verdicts and JNOV's, it is not mandated by the federal procedural rules. *See, e.g., Weir v. Chicago Plastering Institute*, 272 F.2d 883, 888 (7th Cir. 1959).

LBB's third assertion of error must be dismissed. Rule 10(b)(2) of the Federal Rules of Appellate Procedure provides that: "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion". LBB has failed to comply with this rule. Further, LBB's brief failed to

discuss why the record produced at trial would not support the JNOV. Rule 10(b)(2) was promulgated to allow courts to make an independent evaluation of the evidence. The court cannot make an informed decision where this rule has not been complied with.

Accordingly, the judgment appealed from is affirmed.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

L.B.B. CORP.,
Plaintiff-Appellant,
No. 81-1352
vs
CHARLES O. FINLEY & CO., INC.
Defendant-Appellee

Appeal from the United States
District Court for the
Northern District of Illinois
Eastern Division.
No. 74-C-3258
Joseph Sam Perry, Judge

APPELLANT'S MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

For this Court to refuse to rehear and reconsider its decision to dismiss the instant appeal for technical reasons on January 28, 1982 would be, if only in light of the passage of time since the initiation of this litigation and the efforts expended and expenses incurred by both sides, not only the cause of extreme hardship to the Appellant; it will also demean and subvert the system of civil adjudication in effect in the Seventh Circuit and in the United States of America.

The major ground of the Plaintiff's appeal, namely that the trial court erred in entering judgment notwithstanding the verdict on

or about February 10, 1981, was based on the very simple fact that the decision of the trial judge to do so was manifestly erroneous on the face of that record which was appended to the Appellant's brief, filed in May of 1981 pursuant to Circuit Rule 12.

That is because, on December 4, 1980, during the trial, the trial judge, after hearing the defendant's motion for a directed verdict, stated as follows:

"**THE COURT:** I think that this is a case for the jury. Motion denied."

On December 8, 1980, while the jury below was in deliberation, the Court decided in the absence of counsel to discharge the jury and declare a mistrial, then stated as follows:

"**THE COURT:** Gentlemen, you are now discharged. I will invite you into my chambers to take a look at an exhibit that I have.

And of course, there will have to be a new trial; that is if the Plaintiff persists in a new trial. And the reason that I have asked now as to the division, is in order to guide the principles and the parties to what their future conduct might be. It might be possible that the plaintiff may not choose to try the case again under the circumstances, but that is the decision. You are now discharged.

And I will invite you in. Ms. Marshal, you may bring them into my chambers, and I will discuss the matter with them -- not the case, **I will not discuss the case,** but only my exhibit which is in my chambers. (Emphasis supplied)."

Notwithstanding his representations made on the record in Court at the time that the mistrial was declared, the trial judge failed and refused to refrain from discussing the case with the jurors after they had repaired to his chambers with him. That is self-evident from the memorandum decision filed by the trial judge on or about February 10, 1981. In that "Memorandum Order" the trial judge stated as follows:

"The Court desires to note that after the jury's decision, the

jurors were invited into the Court's chambers to view a mastodon exhibit; the jurors briefly discussed their decision and stated that five of them had found in favor of the defendant while only one had found for the plaintiff. This disclosure was later made known by the Court to each party's counsel.

In view of the foregoing, it is ORDERED that each of the aforesaid motions of the defendant be and the same hereby is granted . . ."

Hence, in the view of the Appellant, the decision of the trial judge in February, 1981 to enter judgment notwithstanding the verdict in favor of the defendant was facially deficient, because of his blatant reliance on what he had been told, off the record, by the members of the jury out of the presence of counsel. The error, which the Appellant still maintains is reversible, is therefore clear from the record appendix attached to the Appellant's brief.

To further clarify the position of the Appellant, the Appellant has not requested the panel to decide whether or not the trial judge incorrectly weighed or viewed the evidence in granting the defendant's motion for judgment notwithstanding the verdict. The Appellant stops at the threshhold question of whether or not the Court observed the correct standards to be employed in determining whether or not judgment n. o. v. should have been entered; we are not asking the Court to examine the evidentiary record for its sufficiency insofar as the Appellant's position is concerned. Assuming for the sake of the argument in support of this petition that the position taken by the Appellee is correct, namely that the proper standards for direction of verdicts and entry of judgments notwithstanding the verdict in diversity cases is the State standard, and that the State standard in Illinois as outlined in *Pedrick vs Peoria E.R.R. Co.*, 229 N.E. 2nd 504,513 -- a decision cited by the Appellee in its brief -- is that "the movant is entitled to a directed verdict or judgment notwithstanding the verdict, when all the evidence, viewed in its aspects most favorable to the non-movant so overwhelmingly favors the movant that no contrary verdict based on the evidence could ever stand," it is then manifestly clear from the record already before this Court that the trial

judge did not observe, apply, or perhaps even know about the existence of such a requirement before he entered judgment n. o. v. for the Appellee. In fact, all one has to do is to return to his decision of February 10, 1981, wherein he stated that: "The Court has read and considered each of the aforesaid motions and the memoranda of the respective parties and now finds that defendant's motions are well taken and should be granted for reasons set forth in defendant's Memorandum of Law.".

But it is crystal clear from the record that there was never any Memorandum of Law filed by the defendant in support of its Motion for Judgment Nothwithstanding the verdict; rather, there was a Memorandum of Law filed by the defendant-appellee in support of another motion that had been filed on December 23, 1980, to strike the motion of the Plaintiff-Appellant for judgment notwithstanding the verdict. Consequently, there was yet another error, this one of fact, to compound the impropriety in discussing the case with the jury after it was discharged after representing otherwise on the record, and in failing to apply or observe or even articulate the proper standard of review before granting the motion for judgment n. o. v.

For the aforesaid reasons, the Appellant urges that the Petition for Rehearing, as regards to the second assignment of error, be granted; if this Court deems the filing of a complete file transcript necessary the Appellant prays further for an enlargement of time in which to do so.

Respectfully submitted

J. Joseph Nugent, Jr.
15 Westminster Street, Suite 924
Providence, RI 02903
401-421-9000

602 State Road
Westport, MA 02790
617-672-0139

Date: February 10, 1982

Petitioner's Appendix E
Petition for Rehearing En Banc

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

L.B.B. CORP.,
Plaintiff-Appellant,

No. 81-1352

vs

CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee

Appeal from the United States
District Court for the
Northern District of Illinois
Eastern Division.
No. 74-C-3258
Joseph Sam Perry, Judge

PETITION FOR REHEARING EN BANC

Now comes the Plaintiff-Appellant in the above-entitled cause to petition this honorable Court for a rehearing and/or reconsideration of the unpublished Per Curiam opinion of the three-judge panel assigned to decide this matter on January 28, 1982, specifically as it regards the first and third arguments advanced by the Plaintiff-Appellant on appeal, on the grounds that the within appeal is of exceptional importance because of the panel's unprecedented application of the service provisions of subsections 5(a) and 5(b) of the Rules of Civil Procedure, and because of its disregard of a decision of the U. S. Supreme Court, cited in the Memorandum of Law attached hereto and incorporated by reference, and the creation of an apparent conflict with the Court of Appeals for the Sixth Circuit in deciding that a trial judge need not support entry of judgment

notwithstanding the verdict with findings of fact and conclusions of law.

By its Attorney

J. Joseph Nugent, Jr.
15 Westminster Street, Suite 924
Providence, Rhode Island 02903

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

L.B.B. CORP.,
Plaintiff-Appellant,

No. 81-1352

vs.

CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee

Appeal from the United States
District Court for the
Northern District of Illinois
Eastern Division.

No. 74-C-3258
Joseph Sam Perry, Judge

AFFIDAVIT IN SUPPORT OF PETITION FOR REHEARING EN BANC

I, J. Joseph Nugent, Jr., of Westport, Massachusetts, do hereby make oath and subscribe to the following facts:

1. That I am, and have been since the initiation of this litigation in the U. S. District Court for the District of Rhode Island in 1974, principal counsel to the appellant;

2. Between the time of my admission to the Bar of the State of Rhode Island in 1971 and May 1, 1976, my law offices were located on the sixth floor of a building in Providence, RI, whose street address was 32 Westminster Street; thereafter, to and including February 1, 1982, my regular and usual business address was 15 Westminster Street, Suite 924, (also known as 924 Hospital Bank Building), Providence, RI;

3. At no time did I receive in the mail, or was I otherwise served with, an exact copy of the defendant-appellee's Motion for Judgment Notwithstanding the Verdict, which was apparently

filed in the District Court on or about December 12, 1980, until I received a copy appended to its brief on or after June 25, 1981; an exact copy of the certificate of service preceeding the motion for judgment n. o. v. is attached hereto and incorporated by reference as Exhibit 1.

4. I did not receive the unpublished Per Curiam Order of the three-judge panel of this Court, dated January 28, 1982, until February 4, 1982.

/s/ J. Joseph Nugent, Jr.

Subscribed and sworn to before me this 12th day of February, 1982, at Westport, Massachusetts.

/s/ Gerard R. Hadjer, Notary

MY COMMISSION EXPIRES
MARCH 12, 1987

Exhibit 1

APPELLEE'S APPENDIX I

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

L.B.B. CORP., INC.,
Plaintiff,

vs.

CHARLES O. FINLEY & CO., INC.,
Defendant. NO. 74-C-3258

NOTICE OF MOTION

TO:
J. Joseph Nugent, Jr.
Nugent & Nugent
32 Westminster Street
Providence, Rhode Island 02903

Jeffrey I. Langer
Arvey, Hodes, Costello & Burman
180 N. LaSalle Street
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on December 16, 1980, at 10:00 A.M. or as soon thereafter as counsel may be heard, Defendant, by its Attorney, SAMUEL V. P. BANKS, shall appear before the Honorable J. Sam Perry, or any Judge sitting in his stead, and then and there present a Motion for Judgment Notwithstanding the Verdict, a copy of which is attached hereto.

SAMUEL V. P. BANKS
Attorney for the Defendant
221 N. LaSalle St., 38th Floor
Chicago, Illinois 60601
782-1983

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

L.B.B. CORP.,
Plaintiff-Appellant,

No. 81-1352

vs.

CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee

Appeal from the United States
District Court for the
Northern District of Illinois
Eastern Division.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING EN BANC

The plaintiff-appellant, L.B.B. Corp., a Rhode Island corporation, files the within petition for two reasons: The three-judge panel assigned to decide the appeal disposed of two issues incorrectly by unpublished Order on January 28, 1982. The panel decided that the Appellant was mistaken when it asserted on appeal that the Appellee ("Finley") did not comply with F. R. Civ. P.50 because its Motion for Judgment Notwithstanding the Verdict (JNOV) was not in writing. The Court disposed of that Assertion as follows:

The answer to L.B.B.'s first argument on appeal is that Finley did file a written motion for JNOV which was docketed and became a part of the record on December 17, 1980. If L.B.B.'s counsel had taken time to examine the record, he would have discovered this fact.

This may be correct, but the finding of the Court, namely that the docketing of the motion was sufficient to obviate any claim of apeal flies in the face of F. R. Civ. P. 5(a), (b), regarding service of motions and other pleadings on counsel to all parties. In fact, the Motion for JNOV was not received by Appellant's

counsel. See Affadavit and Exhibit attached hereto.

The second basis for this petition, which clearly involves a question of exceptional importance **and** a possible conflict with decisions of both the U. S. Supreme Court and other courts of appeals, was the refusal of the panel to require the District Court to make findings of facts and conclusions of law at the time that it granted the motion of the appellee for JNOV. The panel determined that this safeguard "is not mandated by the federal procedural rules", citing **Weir vs Chicago Plastering Institute,** 272 F 2d 883,888 (7th Cir. 1959), a decision which is both outdated and inapposite, since it involves only entry of a directed verdick during the course of the trial.

It is the position of the Appellant that, in light of the decisions of the U. S. Court of Appeals for the Sixth Circuit in **Garrison vs Jervis B. Webb Co.,** 583 F. 2d 258 (1978) and **Morelock vs N.C.R. Corp.,** 586 F. 2d 1096 (1978), and because of the mandate of the U. S. Supreme Court in **Baltimore & Carolina Line vs Redman,** 295 U. S. 654 (1935), a question of exceptional importance is created.

In **Redman, supra** the High Court permitted the lower court to rule for the movant on a motion for JNOV only because there has been a reservation by the trial judge of a ruling on the motion for directed verdict which had been filed and/or argued during the trial. The Supreme Court said in that case that the parties' constitutional right to a jury trial was not violated or the province of the jury invaded so long as sufficient evidence was not present so as to justify the reversal of a jury verdict, **and** only because the trial judge had "expressly reserved its ruling on the defendant's motions to dismiss and for a directed verdict," both of which were based on the asserted **legal** insufficiency of the evidence. (Emphasis supplied.) Here, it is a matter of record that the trial judge did not reserve his ruling on the defendant's motion for directed verdict at trial, but denied it outright at the conclusion of the plaintiff's case on December 4, 1980.* See also, **Weade vs Dichmann, Wright, & Pugh, Inc.,** 337 U. S. 801, wherein the Court expressed clear disfavor for the entry of judgments n. o. v. without adequate, explicit support in the record. Here, the trial judge disposed of the parties' post-trial motions as follows:

The Court has read each of the aforesaid motions and the memoranda of the respective parties and now finds the defendant's motions are well taken and should be granted for the reasons set forth in the defendant's Memorandum of Law.

In so far as the F. R. Civ. P. 5 question is concerned, the only reason that it is raised is because of the obvious error of the panel that it is the obligation of the non-movant party to search out the docketed record in the District Court before any assertion of error for violation of Rule 5 can be asserted on appeal. This, of course, is not the case, and the Rule, particularly sub-sections (a) and (b), are clearly to the contrary. The rule reads in pertinent part that: ". . . the service **shall** be made upon the attorney unless service upon the party himself is ordered by the Court". (Emphasis supplied.) In the absence of proper service of motions particularly motions for JNOV, the District Court in fact had no jurisdiction to adjudicate the issue before it. See **American Tel. & Tel. Company vs Merry** 592 F. 2d 118,126 (2d Cir. 1979).

Respectfully submitted,

J. Joseph Nugent, Jr., Esquire

*See Page 20 of Appellant's Original Appendix

Petitioner's Appendices F
Supplemental Petition for Rehearing En Banc

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

L.B.B. CORP.,
Plaintiff-Appellant,

No. 81-1352

vs

CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee.

Appeal from the United States
District Court for the
Northern District of Illinois
Eastern Division.

No. 74-C-3258

Judge J. Sam Perry

SUPPLEMENTAL PETITION FOR REHEARING EN BANC OF THE APPELLANT

Submitted:

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- Affidavit in Support of Petition for Rehearing
- Supplemental Affidavit in Support of Petition for Rehearing
- Memorandum in Support of Petition for Rehearing

CERTIFICATE OF SERVICE

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

L.B.B. CORP.,
Plaintiff-Appellant,

No. 81-1352

vs

CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee

Appeal from the United States
District Court for the
Northern District of Illinois
Eastern Division

No. 74-C-3258
Joseph Sam Perry, Judge

SUPPLEMENTAL PETITION FOR REHEARING EN BANC OF THE APPELLANT

Now comes the Plaintiff-Appellant in the above-entitled cause to petition this honorable Court for a rehearing and/or reconsideration of the unpublished Per Curiam opinion of the three-judge panel assigned to decide this matter, of January 28, 1982, and its subsequent denial of the Petition of the Plaintiff-Appellant for Rehearing, which Petition was denied on or about March 25, 1982 by said three-judge panel without comment. See Exhibit A attached hereto.

This supplemental petition, which arises from the **sua sponte** dismissal of the Plaintiff-Appellant's third assertion of error for violation of F. R. A. P. 10(b) (2), presents a question of exceptional importance because of the misuse and misapplication of said Rule by the three-judge panel, which misuse and/or misapplication has resulted in a denial of the appellant's con-

stitutional right to a jury trial under the Seventh Amendment to the U. S. Constitution.

See Memorandum and Appendix attached hereto.

Plaintiff-Appellant,

By his Attorney

J. Joseph Nugent, Jr.

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617-672-0139

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit

L.B.B. CORP.,
Plaintiff-Appellant,

No. 81-1352

vs

CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee

Appeal from the United States
District Court for the
Northern District of Illinois
Eastern Division.

No. 74-C-3258
Joseph Sam Perry, Judge

MEMORANDUM IN SUPPORT OF SUPPLEMENTAL PETITION FOR REHEARING EN BANC

On January 28, 1982, a three-judge panel of this Court filed an unpublished Order wherein it denied and dismissed the appeal of the plaintiff-appellant. The panel boiled the appeal of the plaintiff-appellant down to three issues, and decided them in the following order: the first issue raised was not well-founded in the record, and in fact was mistakenly raised; the third issue raised, namely that the Trial Court should have supported its decision to grant a motion of the defendant-appellee for judgment notwithstanding the verdict with express findings of fact and conclusions of law, was without merit because the Federal Rules of Civil Procedure do not explicitly require Trial Judges to make such findings of fact and conclusions of law; the last issue, characterized by the panel as "LBB's third assertion of error", when in fact it was the second exception briefed and argued by the plaintiff-appellant, that the defendant's motion for judgment notwithstanding the verdict should not have been granted for the reason put forth by the Trial Judge,

was disposed of by a **sua sponte** dismissal because of an alleged violation by the plaintiff-appellant of Rule 10(b) (2) of the Federal Rules of Appellate Procedure.

Since the Court's disposition of the "third assertion of error" of the plaintiff-appellant was based on an assumed violation of the Rules of Appellate Procedure, which was not so, the plaintiff-appellant petitioned for rehearing by the three-judge panel, on or about February 10, 1982.[1] The argument of the plaintiff-appellant in said Petition was two-fold, namely that the panel was mistaken in assuming that the plaintiff-appellant had violated the Rule by failing to provide adequate transcripts to permit this Court to make an informed decision and, moreover, whether or not a complete trial transcript was provided, the record appended to the brief of the plaintiff-appellant revealed reversible error so clearly as to not require any additional transcription of any additional evidence produced at the trial. In short, the error, manifestly clear from the record already on appeal, was obvious on the face of the written decision of the Trial Judge of February 10, 1981, granting the motion of the defendant-appellee for judgment notwithstanding the verdict. If it were not so obvious, then the allegation of error was substantiated by the transcribed record obtained by the plaintiff-appellant and appended to its brief in May of 1981, mostly of post-trial hearings and proceedings.

Consequently, the plaintiff-appellant, in a nutshell, had complied with F. R. A. P. 10(b) (2) even though it did not have to do so to the extent of providing a complete trial transcript.

Moreover, the plaintiff-appellant wishes to point out once again (see his previous argument attached to his Petition for Rehearing, attached hereto and incorporated by reference as Appendix 1), that it did not at any time intend to urge on appeal that "a finding or conclusion is unsupported by the evidence or is contrary to the evidence" F. R. A. P. 10 (b) (2). As it has argued before, the plaintiff-appellant sought merely to demonstrate that the decision of February 10, 1981, was based on both mistakes and improprieties occurring during post-trial proceedings, not on an incorrect assessment or review of the evidentiary record by the Trial Judge.[2]

For the above reasons, and for the reasons set forth in the earlier argument attached hereto and incorporated by reference (Appendix 1), and for the reason that the Seventh Amendment to the U. S. Constitution, as interpreted in this context by the U. S. Supreme Court in **Slocum vs. New York Life Insurance Co.,** 33 S. Ct. 523 (1913) and in **Baltimore & Carolina Line vs. Redman,** 55 S. Ct. 890 (1935)[3] , has been violated by the refusal of both the District Court and this Court to give plaintiff-appellant a new trial, the plaintiff-appellant prays herein for rehearing and restoration of this cause to the calendar for a decision on the merits.

[1] In fact, at the same time that the plaintiff-appellant so moved before the three-judge panel on February 10, 1982, the plaintiff-appellant moved for an enlargement of time in which to obtain and file a complete transcript of the trial proceedings if this Court deems it essential. Partial payment for such transcript has been forwarded to the trial reporter.

[2] According to the decision of the Seventh Circuit Court of Appeals in **Bonner vs. Coughlin,** 657 F. 2d 931 (7th Cir. 1981) at pages 938-939, in order for a trial court to properly grant a motion for JNOV the motion must be reserved for decision by the trial judge if made before the close of all the evidence if not made or renewed at the close of all of the evidence. This decision implies that a reversal will necessarily follow a failure of a Trial Judge to observe this procedure, with no need for the appealing party to prove also that the grant of the motion was not supported by any of the evidence at the trial. This is a similar review situation.

[3] See also **Munn vs Mutual Services Casualty Insurance Co.,** 88 FRD 364, 367, fn. 8 (N. D. Calif. 1980)

Exhibit A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

March 25, 1982

Before

Hon. Luther M. Swygert, Senior Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge

L.B.B. CORP.,
Plaintiff-Appellant,

No. 81-1352

vs.

CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee.

Appeal from the United States
District Court for the
Northern District of Illinois
Eastern Division.

No. 74-C-3258
Joseph Sam Perry, Judge

ORDER

On consideration of the petition for rehearing filed by counsel for the plaintiff-appellant, the judges on the panel have voted to deny the petition.

IT IS THEREFORE ORDERED that said petition for rehearing be, and the same is hereby denied.

CERTIFICATE OF SERVICE

I, J. Joseph Nugent, Jr., do hereby certify under the pains and penalties of purgery that I served, via regular U.S. Mail, postage prepaid, two exact copies of the foregoing petition for Issuance of Writ of Certiorari and Appendices on Terrence P. LeFevour and Samuel V.P. Banks on July 29, 1982 at their regular and usual business address: 221 N. LaSalle St., 38th Floor, Chicago, Illinois 60601.

Office-Supreme Court, U.S.
FILED
OCT 25 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-184

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

L.B.B. CORPORATION,
Petitioner

v.

CHARLES O. FINLEY & CO., INC.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT, CHARLES O. FINLEY & CO., INC., IN OPPOSITION

SAMUEL V. P. BANKS
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Chicago, Illinois 60601
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Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether or not the decision of the U.S. District Court granting the motion of the respondent for judgment notwithstanding the verdict was correct.

2. Whether or not the opinion of the three-judge panel of the court of appeals affirming the trial court for non-substantive reasons was correct.

3. Whether or not the denial of the petition for rehearing was correct.

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IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF FOR THE RESPONDENT, CHARLES O. FINLEY & CO., INC., IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1982. A petition for rehearing on said decision was denied March 25, 1982. The petition for a writ of certiorari

was filed on July 29, 1982. The jurisdiction of this court is invoked by the petitioner under 28 U.S.C. 2101 and 28 U.S.C. 1254.

STATEMENT

The petitioner, L.B.B. Corporation, filed suit against the respondent, Charles O. Finley & Co., Inc., in the United States District Court for the District of Rhode Island on April 26, 1974. The basis of said suit was a written contract entered into between the petitioner and respondent on May 30, 1973 in Chicago, Illinois. The basis of jurisdiction for the suit was diversity.

After service of process on the respondent on April 30, 1974, the respondent filed a motion to dismiss for lack of in personam jurisdiction. Said motion was granted by the chief judge of the U.S. District Court of Rhode Island on October 31, 1974. On November 8, 1974, the petitioner's motion to

transfer this cause to the United States District for the Northern District of Illinois was granted.

Following, among other matters, the denial of the petitioner's motion for summary judgment in 1976, this cause was transferred to Senior Judge J. Sam Perry on July 1, 1980. It was called for trial on December 1, 1980. The trial commenced on that date, continuing until December 5, 1980. The jury then deliberated for approximately eight hours, on December 5, 1980, and Monday, December 8, 1980. After a special instruction was then given to the jury and after further deliberation, they were dismissed as being hopelessly deadlocked.

On December 16, 1980, counsel for the respondent filed with the trial court its written motion for judgment notwithstanding the verdict. Said motion having been served on petitioner's trial counsel in Rhode Island, it was then presented in open court to local counsel for the petitioner. While filing this

motion, counsel for the respondent informed the trial court that the motion as drafted would stand as respondent's memorandum of law in support of its request for judgment notwithstanding the verdict.

On December 18, 1980, counsel for the petitioner filed a motion for judgment notwithstanding the verdict in its behalf. Said motion came before the trial court on December 23, 1980 at which time counsel for the respondent filed a motion in opposition to petitioner's motion for judgment notwithstanding the verdict, praying that said motion be stricken. A memorandum in support of respondent's motion to strike was filed on January 16, 1981.

On February 10, 1981, the trial judge, after taking the matter under advisement on the motions and memoranda filed by opposing counsel, issued a memorandum order granting the respondent's written motion for judgment notwithstanding the verdict and its motion to strike the

petitioner's motion for judgment notwithstanding the verdict (see Pet. App. A). An appeal was claimed in the court of appeals by the petitioner on or about February 27, 1981.

Briefs were filed on the issues raised in the petitioner's brief and oral argument was set for early December, 1981. Upon motion of the petitioner, oral arguments in this matter were waived. The court of appeals took the matter under advisement on the briefs which had been filed. On January 28, 1982, the court of appeals filed an order dismissing all of petitioner's contentions and thereby affirming the judgment granted by the trial court on behalf of the respondent (Pet. App. B). A petition for rehearing was filed on March 8, 1982 (Pet. App. D) and was denied by the court of appeals on March 25, 1982 (Pet. App. C).

ARGUMENT

1. Petitioner contends (Pet. 13-16) that the district court erred in granting judgment

notwithstanding the verdict without setting forth express findings of fact and conclusions of law in support of said judgment. For reasons well stated in the court of appeals decision upon which we rely, that contention is without merit.

Petitioner suggests that a failure to specify such findings in writing would lead to a conflict between different circuits of the courts of appeal. This allegation is totally without merit. In support of its claim, petitioner refers to two cases decided in the Sixth Circuit: Garrison v. Jervis B. Webb Co., 583 F.2d 258 (6th Cir. 1978) and Morelock v. NCR Corp., 586 F.2d 1096 (6th Cir. 1978). In Garrison, the Sixth Circuit Court of Appeals, in dicta located in a footnote, commented that it is the better practice to make formal findings of fact and conclusions of law when granting a judgment notwithstanding the verdict. However, the court went on to state that there is by no means a requirement under Federal Rule

of Civil Procedure 50 to make such express findings. Garrison, 583 F.2d at 261. Thus, while recommending the practice of express findings in a situation where a judgment notwithstanding the verdict is contemplated, the Garrison court did not hold contrary to petitioner's claims that it was an absolute necessity. This conclusion is obvious from the subsequent Morelock decision, where the same court of appeals, just two months later, held that it would not reverse a decision and remand it for new trial solely because the trial court had failed to make express findings of fact and conclusions of law when granting a judgment notwithstanding the verdict, pursuant to Federal Rule of Civil Procedure 50. Morelock, 586 F.2d at 1098.

Examination of these decisions and the decision by the court of appeals in this case (Pet. App. B) reveal that the court of appeals for the Sixth Circuit and the Seventh Circuit are not in conflict but rather in accord. In

ruling on the necessity of express, written findings, the court of appeals herein held that:

> Although this court would prefer that the district court make findings of fact and conclusions of law in directed verdict and in judgment notwithstanding the verdict, it is not mandated by Federal Procedural Rules. Weir v. Chicago Plastering Institute, 272 F.2d 883, 888 (7th Cir. 1959) (Pet. App. B)

After stating this desire, which is obviously in accord with the desires of the Sixth Circuit, the court of appeals nonetheless proceeded to uphold the judgment notwithstanding the verdict in this case, despite omission of the trial court in making express findings of fact and conclusions of law.

Despite this absence of conflict among the circuits requiring examination by this Court, the petitioner goes on to cite a number of cases which would supposedly mandate express findings in a Federal Rule of Civil Procedure 50 situation, e.g. a judgment notwithstanding

the verdict (Pet. 14). Examination of the cases listed in this section of the brief, however, reveal that not only do none of them deal with Federal Rule of Civil Procedure 50, but in addition, none remotely suggest that express findings of fact and conclusions of law are required when one grants a judgment notwithstanding the verdict pursuant to Federal Rule of Civil Procedure 50.

Finally, petitioner's suggestion that a recent decision of the Court of Appeals for the Seventh Circuit is at variance with the decision in this case is incorrect. Petitioner's statement of the holding in that case, Bonner v. Coughlin, 657 F.2d 931 (7th Cir. 1981), is totally misleading. Rejecting the strict rule on the procedures to be followed to preserve a motion for directed verdict throughout the various stages of a trial, the court of appeals therein held that a judge does not have to reserve a ruling on a directed

verdict in order to grant a judgment notwithstanding the verdit at a later time. Bonner, 657 F.2d at 939.

Finally, petitioner's argument that its Seventh Amendment rights were violated by the granting of judgment notwithstanding the verdict is without merit. Petitioner's reliance on a case decided before Federal Rule of Civil Procedure 50 was promulgated, to substantiate this point only underscores the specious nature of this argument.

2. Petitioner also complains (Pet. 10-11, 16-18) that court of appeals erred when it affirmed the trial court for "nonsubstantive" reasons. Apparently, petitioner, by use of the term "nonsubstantive," is referring to the court of appeals' dismissal of the petitioner's attempt to overturn the judgment notwithstanding the verdict for failure of the petitioner to file relevant transcripts. Federal Rule of

Appellate Procedure 10(b)(2). Accordingly, petitioner is requesting that this Court exercise its supervisory power to remedy this situation. For reasons well stated in the record of this cause and in the opinion of the court of appeals, again upon which we rely, this contention and request is without merit.

Specifically, petitioner requests that this Court invoke its supervisory power to overturn the court of appeals decision because, supposedly, the court therein required the petitioner, even though the petitioner did not raise the question of the sufficiency of the evidence, to file transcripts of all evidence adduced at trial before it considered the adverse decision of the trial court. (Pet. 16) For the following reasons, no invocation of the supervisory powers of this Court is necessary.

First, the court of appeals never requested that the petitioner file "transcripts of all evidence adduced at trial." (Pet. 16) Rather,

consistent with the requirements of Federal Rule of Appellate Procedure 10(b)(2), the court of appeals merely requested that if the petitioner felt that in some manner the judgment notwithstanding the verdict was improvidently granted or unsupported by or contrary to the evidence, it

> "shall include in the record a transcript of all evidence relevant to such a finding or conclusion." (Pet. App. B, emphasis added)

Without this, the court of appeals correctly concluded that it could not make an informed decision and thereby declined to make one, thus affirming judgment in respondent's behalf.

Sidestepping this discrepancy neatly, petitioner further suggests that the court, without benefit of a transcript, should still have overturned the judgment notwithstanding the verdict because it was

> "so clearly deficient on its face as to justify a reversal and new trial." (Pet. 17)

One wonders, as must have the court of appeals, what is so clearly deficient on the face of the memorandum order granting judgment notwithstanding the verdict to the respondent that required reversal, without citation to a specific error. And despite petitioner's protestation that although they never filed a transcript, they never suggested the conclusion of the trial judge was unsupported by or contrary to the evidence (Pet. 17), the record indicates otherwise. In the brief which the petitioner filed in the Seventh Circuit Court of Appeals, petitioner states, without citation to any transcript, the following:

> "In the instant matter, in addition to the failure of the court below to even mention the rule to be observed, followed and/or applied, the court clearly did not assess all of the evidence in a light most favorable to the party moved against in order to determine whether it so overwhelmingly favored the movant that no contrary verdict based on the evidence could ever stand. Pittsburgh-DesMoines Steel v. Brookhaven Manor Water Co., supra. This is manifest from the decision

> attached hereto as Appendix 6." (Appendix 6 is petitioner's Appendix A, the memorandum order of the trial court.)(Petitioner's brief in the Seventh Circuit Court of Appeals, pp. 21-22.)

In light of this statement, it is obvious why the court of appeals dismissed this particular argument for failure to file a transcript. In so doing, it was merely applying Federal Rule of Appellate Procedure 10(b)(2), the interpretation which and the enforcement of have allowed the sanction of dismissal over the years. United States v. One Motor Yacht Named Mercury, 527 F.2d 1112 (1st Cir. 1975); Peymann v. Perini Corp., 507 F.2d 1318 (1st Cir. 1974); United States v. Gallagher, 151 F.2d 556 (10th Cir. 1945); McBee v. United States, 126 F.2d 238 (9th Cir. 1942), cert. denied 317 U.S. 691. Accordingly, there is nothing in the entire record which indicates that the court of appeals in this particular case as so far departed from the accepted and usual course of judicial

proceeding or so far sanctioned such a departure by a lower court, which would call for an exercise of this Court's power of supervision. Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955).

3. Petitioner finally contends that the denial of its petition for rehearing was error by the court of appeals. Presumably, although not expressly stated, the petitioner is again invoking this Court's supervisory power to remedy this alleged error. A review of the record in this cause reveals no basis for this Court to exercise its supervisory power to overturn the court of appeals' denial of a petition for rehearing.

The particular rule involved here requires that a petition for rehearing shall state with particularity the points of law or fact which in the opinion of the petitioner the reviewing court has overlooked or misapprehended, and in addition shall contain such argument in support

of the petition as desired. Federal Rule of Appellate Procedure 40(a). Part of the petition for rehearing filed by the petitioner dealt with such issues. Basically, the petitioner raised the same argument which have been previously discussed in sections 1 and 2 herein, supra. In denying the petition for rehearing on these specific grounds, the court of appeals was obviously indicating that nothing had been presented to them to change its earlier decision.

However, the bulk of the petition for rehearing dealt with petitioner's belated attempt to file a transcript regarding the issues raised in the brief regarding the judgment notwithstanding the verdict (Pet. App. D). Examination of the Federal Rules of Appellate Procedure (FRAP. 40(a) reveal that this is not a proper issue for a petition for rehearing, in that it was not an issue raised by the original briefs. Marion Steam Shovel Co. v. Bertini,

82 F.2d 945 (8th Cir. 1938). On a more practical level, however, it is obvious that this is an ex post facto attempt by the petitioner to mislead the court of appeals. Petitioner's own exhibits indicate that as early as December 15, 1981, petitioner's lawyer had been notified by the Clerk of the Court of Appeals for the Seventh Circuit that the Court of Appeals needed transcripts relevant to petitioner's arguments regarding the judgment notwithstanding the verdict in order to make an informed decision on petitioner's claims. (Pet. App. D, Exhibits 1, 2, 3) No action having been taken by the petitioner to satisfy the court of appeals' request, the court then rendered its decision approximately one and one-half months later. Since no transcripts were filed during that month and a half period, petitioners' later request to file transcripts, as raised in the petition for rehearing, appropriately fell upon deaf ears. No basis exists for this court to exercise its

supervisory power to overturn the denial of the petition for rehearing, in that the court, in making this decision, obviously has not departed from the accepted and usual course of judicial proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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